City & Suburban Delivery Systems, Inc. *and* Newspaper and Mail Deliverers' Union of New York and Vicinity, Petitioner.

City & Suburban Delivery Systems, Inc., Employer-Petitioner *and* Newspaper and Mail Deliverers' Union of New York and Vicinity. Cases 29–RC–9016 and 29–RM–875

March 31, 2000

DECISION ON REVIEW AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS FOX AND BRAME

On April 20, 1998, the Regional Director for Region 29 issued a Decision and Order Dismissing Petition in Case 29–RC–9016 and Decision and Direction of Election in Case 29–RM–875 (pertinent portions are attached as an appendix). The Regional Director found that five return room counters at the Employer's Farmingdale, New York facility, who had been historically excluded from the unit sought by the Employer in its RM petition and by the Intervenor, Technical, Office and Professional Union, United Auto Workers, Local 2110, AFL–CIO (Local 2110), must be included in the bargaining unit with the unrepresented return room employees, counters, scanners, adders, auditors, receivers, and data entry employees employed by the Employer at the facility.

Thereafter, in accordance with Section 102.67 of the National Labor Relations Board's Rules and Regulations, the Newspaper and Mail Deliverers' Union of New York and Vicinity's (NMDU) filed a timely request for review of the Regional Director's decision. NMDU contended that the five return room employees, historically represented by NMDU under its Long Island City collective-bargaining agreement, do not share a community of interest with the bargaining unit sought at Farmingdale. On December 17, 1998, the Board granted NMDU's request for review.

The Board has delegated its authority in this proceeding to a three-member panel.

We have carefully considered the entire record in this case with respect to the issue on review. The Board finds, contrary to the Regional Director, that the five return room counters at the Farmingdale facility currently represented by NMDU may not, under the facts of this case, be included in a bargaining unit with the unrepresented return room employees, counters, scanners, adders, auditors, receivers, and data entry employees employed by the Employer at its Farmingdale facility.

NMDU represented drivers and warehouse floormen at Metropolitan News in Long Island City for a period of about 20 years prior to the Employer's purchase of Metropolitan News in 1992. These employees transferred to the Employer after the purchase and were covered by a collective-bargaining agreement between NMDU and the Employer. After the purchase, NMDU filed a grievance claiming that the Employer withdrew return room work belonging to its bargaining unit members and assigned the work to office employees. On October 30, 1994, an arbitrator sustained the grievance and awarded the return room work to the drivers represented by NMDU, noting that the Employer may also assign similar work to office employees. Thereafter, the Employer and NMDU negotiated an agreement to implement the arbitration award, which provided that the Employer would establish five new day-side jobs at Long Island City devoted to counting returns serviced by routemen distributing newspapers from Long Island City.[1]

The Employer purchased Imperial Delivery Service in 1996, which had a facility in Farmingdale. The Employer thereafter consolidated some of its Long Island City operations with preexisting operations at the newly acquired Farmingdale facility. In 1996, the five return room counters represented by NMDU were transferred to the Farmingdale facility. Following the transfer, these five employees remained in the unit with the drivers and floormen at Long Island City, and continued to be covered under NMDU's collective-bargaining agreement with the Employer.

Local 2110 had historically represented office employees at the Employer's Long Island City facility, and continued to do so after the consolidation. Local 2110 demanded recognition for 122 Farmingdale office employees (return room, customer service, data entry, computer operator, and other office positions), filing a demand for arbitration of this issue. The Employer filed a unit clarification petition in Case 29–UC–457 in response to this claim, seeking to clarify the Long Island City contract unit by specifically excluding those employees working at Farmingdale. The Regional Director issued a Decision and Order dated August 21, 1997, excluding the Farmingdale employees from the Long Island City contractual unit. The Board denied Local 2110's request for review of this decision on December 17, 1998.

The Employer filed an RM petition in the instant case on March 17, 1998, seeking to include all return room employees, counters, scanners, adders, auditors, receivers, and data entry employees in the unit. On March 18, 1998, NMDU filed an RC petition seeking to represent the employees in the RM unit, except for the five return room counters already represented by NMDU and currently covered by the Long Island City collective-bargaining agreement between NMDU and the Employer.[2]

[1] The agreement set forth the terms and conditions of employment for these five employees, providing that the employees had to be regular situation holders on NMDU's seniority list. Four of the five positions were open to bidding by seniority, and the fifth position was set aside for assignment on an ad hoc basis to disabled members who could not physically perform their duties.

[2] NMDU had previously filed a petition in Case 29–RC–8975, seeking to represent the same unit at Farmingdale sought in the instant case. A hearing took place on January 29, 1998, and NMDU thereafter withdrew its petition inasmuch as it was not prepared to proceed at the time.

Contrary to the Regional Director, we find that the facts of this case do not warrant including the five return room counters' in a unit from which they have been historically excluded. Significantly, NMDU has historically represented the five return room employees as part of the Long Island City bargaining unit of drivers and floormen. The Employer continued to apply its collective-bargaining agreement with NMDU to the five return room counters after their move to Farmingdale. The agreement provides for different wages, different work hours,[3] and a separate seniority list. The agreement guarantees the five return room counters five work assignments per week through May 31, 2000, provided that they remain part of the bargaining unit. By contrast, most of the approximately 100 unrepresented employees at Farmingdale work 4 days per week on a part-time basis. The bidding for the five positions continues to be available only to those individuals on the Long Island City seniority list. Further, there is a lack of work contact and temporary transfers between NMDU's five return room employees and the other return room employees. In this regard, the five represented return counters work on the first floor of the Farmingdale facility, and the remainder of the return room employees work on the second floor.

We find this case to be distinguishable from *U.S. West Communications*, 310 NLRB 854 (1993). In that case, the Board found that toll technicians, represented by two labor organizations, lost their separate identity because of reorganization and changes in technology, notwithstanding some differences in terms and conditions of employment created by separate collective-bargaining agreements. In that case, however, unlike here, the two groups of employees worked side-by-side and there was evidence of employee transfers between the groups.[4]

Based on the above, we conclude that the only appropriate unit consists of unrepresented return room employees, counters, scanners, adders, auditors, receivers, and data entry employees employed by the Employer at its Farmingdale, New York facility, and must exclude the five return counters represented by NMDU. Accordingly, the Regional Director's Decision and Order Dismissing Petition in Case 29–RC–9016 and Decision and Direction of Election in Case 29–RM–875 is reversed, and the petition in Case 29–RC–9016 is reinstated. This proceeding is remanded to the Regional Director for further appropriate action. We direct the Regional Director, when counting the impounded ballots, to not count the challenged ballots of the five return room counters represented by NMDU.

[3] The five return room counters work from 7 a.m. to 2:54 p.m., while the unrepresented return room employees work more flexible hours.

[4] We note that this case is also distinguishable from *Fleming Foods*, 313 NLRB 948 (1994). In that case, the Board found that the petitioned-for unit of full-time warehouse clerical employees was too narrow as it inappropriately excluded two part-time warehouse clerical employees who performed the same duties as the petitioned-for employees and were regular employees working 20 to 24 hours a week. In that case, unlike here, there was no evidence that the part-time employees were represented by another union and covered by another collective-bargaining agreement, or that they lacked contact and interchange with the full-time employees.

APPENDIX

DECISION AND ORDER DISMISSING PETITION IN CASE 29–RC–9016 AND DECISION AND DIRECTION OF ELECTION IN CASE 29–RM–875

4. The Employer's RM petition seeks to include all return room employees, counters, scanners, adders, auditors, receivers, and data entry employees. The Petitioner seeks to represent the employees in the RM unit, except that it seeks to specifically exclude five return room counters who are represented by it and who are currently covered by a collective-bargaining agreement between the Petitioner and the Employer.[2] In essence, the Petitioner argues that the five return room employees do not share a community of interest with the remainder of the return room employees employed by the Employer. In support of its contention, the Petitioner called return room employee Frank LaPenna to testify. The Employer called its director of labor relations, James Baker, to testify.

The testimony of the witnesses, coupled with evidence set forth in the UC Decision and Order, essentially establish the following. For a period of about 20 years, the Petitioner had a collective-bargaining agreement with Metropolitan News Co. (Metropolitan), whose facility is located in Long Island City. Sometime in 1992, the Employer purchased Metropolitan. After the Employer's purchase of Metropolitan, the Petitioner filed a grievance claiming that the Employer withdrew return room work belonging to its bargaining unit members. On October 30, 1994, an arbitrator sustained the grievance and awarded the return room operations to the employees represented by the Petitioner.[3] Subsequent thereto, the Employer and the Petitioner negotiated a collective-bargaining agreement covering the wages, hours, and terms and conditions of employment of return room employees employed in the Long Island City facility.[4] In June 1996, the Employer purchased Imperial Delivery Service (IDS), which entity had two locations, one in Farmingdale and one in New Rochelle. Upon the purchase of IDS, the Employer decided to consolidate some of its Long Island City operations with the pre-existing operations at the newly acquired Farmingdale facility. Then, sometime in the fall of 1996, five of the Petitioner's return room counter personnel were transferred to the Farmingdale facility. It is undisputed that

[2] It should be noted that the Petitioner initially sought to represent "all return room counters, scanners and data entry personnel" employed by the Employer at its Farmingdale, New York facility. However, the Petitioner later amended its petition to include all return room counters, adders, auditors, receivers scanners, and data entry employees, which unit is coextensive with the one sought by the Employer in its RM petition. Thus, as detailed more fully above, the sole issue during the hearing involved the five return room employees currently covered by the Petitioner's contract. The Petitioner argues that these five return room employees do not share a community of interest with those in the petitioned-for unit.

[3] P. Exh. 1. Although the arbitrator awarded return room counting work to the Petitioner, the arbitrator also noted that the Employer may assign similar work to other employees, for example, office employees. It is not clear from the record whether this actually occurred.

[4] Emp. Exh. 6.

since this transfer, the five return room counter employees continue to be covered by the Petitioner's collective-bargaining agreement with the Employer.

The record establishes that the Farmingdale location is a two-story facility. The Petitioner's five return room employees work on the first floor, while the remainder of the return room employees work on the second floor. All of the return room employees perform the same work, regardless of whether they are represented by the Petitioner, whether they are unrepresented or whether they are located on the first or second floor, i.e., they count and record the number of newspapers that are returned by vendors as unsold. (Tr. 204–205.)[5] In this regard, the Petitioner's witness, LaPenna, testified that unsold newspapers are returned to the second floor of the Farmingdale facility and a foreman transports some of these newspapers down to the first floor return room employees to count. Thus, both groups of employees, i.e., the five former Long Island City return room employees, who are located on the first floor, and the more numerous return room employees on the second floor, count unsold newspapers, albeit at a different location within the facility. With the exception of retrieving some pens, paper, and other office supplies from the second floor, there appears to be little work-related contact between the Petitioner's five return room employees and the other return room employees. Nor does there appear to be any temporary transfers between these two groups. Although LaPenna testified that, in the past, the five return room employees reported to their former supervisor who remained in Long Island City, the record established that in or about January 1998, the Employer hired Jim Hart as the director of return room operations in Farmingdale. Immediately thereafter, the Petitioner's five return room transferees from Long Island City were informed that they must report to Hart. All the other Farmingdale return room employees, who are located on the second floor of the facility, report to Hart as well. LaPenna claims that prior to the hire of Hart, the Petitioner's five return room employees recorded unsold newspapers in the same manner they did so while located in Long Island City facility. However, upon Hart's hire, all return room employees, including the Petitioner's five return room employees, were informed that they must employ a certain code system when counting and recording unsold goods. Although it appears that, in the past, the five return room transferees signed in on a Long Island City payroll sheet, the record established that since January 1998 they have been signing in on a Farmingdale payroll form, as are all other Farmingdale employees. It is undisputed that the Farmingdale facility has a seniority list and that the five return room employees who transferred from Long Island City are not on that seniority list. Rather, their seniority appears on a Long Island City seniority list, inasmuch as their terms and conditions of employment are covered by the Petitioner's collective-bargaining agreement covering Long Island City employees.[6]

The Petitioner argues that the five return room employees it represents should be specifically excluded from the petitioned-for unit inasmuch as they do not share a community of interest with the return room employees located on the second floor. In particular, the Petitioner notes that the five employees it represents are covered by a collective-bargaining agreement providing for different wages, hours, and seniority. The Petitioner also argues that these five employees, until recently, were on the Long Island City payroll, reported to a Long Island City supervisor, and recorded unsold newspapers in a manner utilized in Long Island City. However, I find, for the following reasons, that these arguments are not compelling.

In my view, the Petitioner's five return room employees lost their separate identity when they transferred to the Farmingdale facility. These five employees perform similar tasks (counting unsold goods), with similar equipment (pens, pencils, and a coding system), and are supervised by the same person, Hart.[7] Despite some differences created by the Petitioner's collective-bargaining agreement, it appears that all return room employees, regardless of the facility from which they originated, share a significant community of interest based, for the most part, on the fact that they perform identical work. It cannot be denied that the Petitioner has a substantial history of representing these employees in a separate location and/or unit, that their conditions of employment are different from other return room employees due to the terms of the Petitioner's collective-bargaining agreement, and that these five employees are physically separated from other return room employees. However, in and of itself, these factors do not form a sufficient basis for excluding these five employees from a unit of other return room employees. Simply put, all return room employees, including the

[5] Although the Petitioner contends that its five return room employees are currently restricted to counting only returns from certain geographical areas (referred to in the record as "1000 accounts"), it is immaterial that the work is divided up by geographical area. The significant factor in determining whether groups of employees share a community of interest is whether they perform substantially similar work under common supervisory and working conditions. Here, this appears to be the case: all return room employees count and record the number of unsold newspapers.

[6] It should be noted that there was a significant amount of testimony and exhibits that were, at best, tangential to the core issue here, i.e., whether the five represented return room employees share a community of interest with other return room employees. The Petitioner elicited a significant amount of testimony and submitted a number of exhibits in order to establish a "history," dating back from 1970, that the employees it represents have a separate community of interest. Counsel for the Petitioner was directed by the hearing officer to elicit testimony concerning the current situation, rather than resorting to historical references from 20 years ago. The hearing officer also attempted to streamline the hearing by securing stipulations. Despite the Employer's willingness to enter into factual stipulations that would have alleviated much of the documentary evidence, the Petitioner's counsel refused and insisted on burdening the record with voluminous documents. The record was unnecessarily clouded with documents and testimony due to the Petitioner's counsel's resistance to comply with the hearing officer's recommendations to narrow the scope of his questioning and enter into factual stipulations. In my view, the hearing officer made every effort to control the testimony so as to provide the clearest record possible and counsel's unwarranted resistance resulted in a record of more length than necessary.

[7] As indicated above, the Petitioner's argument that its five return room employees count returns from a different geographical area does not sufficiently support a finding that they have a separate community of interest and are entitled to a separate unit on that basis. It is immaterial that the work is divided up by geographical area. The significant factor in determining whether groups of employees share a community of interest is whether they perform substantially similar work. Here, this appears to be the case; all return room employees count and record the number of unsold newspapers at the same facility, albeit on a different floor.

five represented by the Petitioner, perform identical work, report to the same supervisor and are situated at the same location. The bargaining history regarding these five employees is insufficient to warrant their exclusion from the overall bargaining unit sought by the Intervenor and concurred in by the Employer.[8]

Based on all of the above, I find that the following constitutes an appropriate unit within the meaning of Section 9(b) of the Act:

> All full-time and regular part-time return room employees, counters, scanners, adders, auditors, receivers and data entry employees employed by the Employer at its Farmingdale, New York, facility, excluding office clerical employees, guards and supervisors as defined in the Act.

[8] See *U.S. West Communications, Inc*., 310 NLRB 854 (1993), where the Board found that toll technicians, represented by two labor organizations, lost their separate identity because of changes in technology. The Board held that these two groups of employees perform similar work, with similar equipment and under similar supervision, and, other than being represented by different organizations, the work is the same. The Board also noted that while there were some differences created by the two separate bargaining agreements, the two groups otherwise share a community of interest. See *Fleming Foods, Inc.*, 313 NLRB 948 (1994), where the Board found that the petitioned-for unit of warehouse clerical employees was too narrow as it inappropriately excluded two part-time warehouse clerical employees who perform the same duties as the petitioned-for employees and work 20 to 24 hours per week.